



DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 300

[Docket No. 220531-0126]

RIN 0648-BJ86

International Fisheries; Western and Central Pacific Fisheries for Highly Migratory Species; Implementation of Emergency Decisions of the Western and Central Pacific Fisheries Commission

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: Under authority of the Western and Central Pacific Fisheries Convention Implementation Act (WCPFC Implementation Act), NMFS issues this rule to make final an interim rule that established a framework to implement short-notice decisions of the Commission on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (Commission or WCPFC).

DATES: Effective [*Insert date 30 days after date of publication in the FEDERAL REGISTER*], we confirm the effective date of June 11, 2021 of the interim final rule published on June 11, 2021 (86 FR 31178).

ADDRESSES: Copies of supporting documents prepared for this final rule, including the regulatory impact review (RIR), the programmatic environmental assessment (PEA), 2019 supplemental environmental assessment (SEA), and 2021 SEA, as well as the interim final rule (86 FR 31178; June 11, 2021), are available via the Federal e-rulemaking Portal, at www.regulations.gov (search for Docket ID NOAA–NMFS–2020–0150). Those documents are also available from NMFS at the following address: Michael

D. Tosatto, Regional Administrator, NMFS, Pacific Islands Regional Office (PIRO),
1845 Wasp Blvd., Building 176, Honolulu, HI 96818.

FOR FURTHER INFORMATION CONTACT: Rini Ghosh, NMFS PIRO, 808-725-5033.

SUPPLEMENTARY INFORMATION:

Background

On June 11, 2021, NMFS published an interim final rule to establish a framework to implement short-notice decisions of the Commission (86 FR 31178; June 11, 2021). The 30-day comment period for the interim final rule closed on July 12, 2021.

The Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (Convention) is concerned with the conservation and management of highly migratory fish stocks (HMS) and the management of fisheries for HMS. The objective of the Convention is to ensure, through effective management, the long-term conservation and sustainable use of HMS in the western and central Pacific Ocean (WCPO). To accomplish this objective, the Convention established the Commission, which includes Members, Cooperating Non-members, and Participating Territories (collectively referred to here as “members”). The United States of America is a Member. American Samoa, Guam, and the Commonwealth of the Northern Mariana Islands are Participating Territories.

This final rule is issued under the authority of the WCPFC Implementation Act (16 U.S.C. 6901 *et seq.*), which authorizes the Secretary of Commerce, in consultation with the Secretary of State and the Secretary of the Department in which the United States Coast Guard is operating (currently the Department of Homeland Security), to promulgate such regulations as may be necessary to carry out the obligations of the United States under the Convention, including the decisions of the Commission. The authority to promulgate regulations has been delegated to NMFS. The preamble to the

interim final rule provides background information on a number of matters, including the Convention and the Commission, and the basis for the regulations, which are not repeated here.

Under the interim final rule, NMFS established a process to implement short-notice WCPFC decisions requiring immediate action that address relevant global or regional health, safety, and security concerns, as well as other international emergencies and crises. NMFS used that process to implement three short-notice WCPFC decisions through temporary specifications that waived specific requirements for purse seine observer coverage, purse seine at-sea transshipment, and at-sea transshipment observer requirements. NMFS has extended those temporary specifications several times, and based on the most recent WCPFC decision to extend the waivers for purse seine observer coverage and at-sea transshipment observer coverage, has extended those two temporary specifications until June 10, 2022 (87 FR 21812; April 13, 2022).

Under the process established in the interim final rule at 50 CFR 300.228, temporary specifications may remain in effect for a period less than one year. Due to current COVID-19 conditions, the Commission has decided to extend the WCPFC decisions to waive specific requirements for purse seine observer coverage and at-sea transshipment observer requirements until June 15, 2022, which is beyond the period of one year, and the Commission may issue additional extensions of those waivers until worldwide COVID-19 conditions improve. Thus, NMFS is simultaneously issuing a separate interim final rule (RIN 0648-BL24) to extend the time period in which COVID-19 related temporary specifications may be effective from less than one year to no later than December 31, 2023, after which date the effective period will revert back to less than one year.

The Action

This final rule makes permanent the changes to 50 CFR part 300, subpart O, that were made by the interim final rule establishing a framework through which NMFS may issue temporary specifications, each for a period less than one year in total, inclusive of all extensions, that promptly suspend or modify specific existing regulations in subpart O. Those regulations were detailed in the interim final rule and implement the United States' obligations under the Convention and WCPFC decisions.

As appropriate, temporary specifications may remain in effect up to 30 days after the expiration of the underlying WCPFC decision to allow NMFS adequate time to issue extensions or changes to the temporary specification, if needed, without unnecessarily exceeding the timeframe of the underlying WCPFC decision.

Any temporary specification issued pursuant to this framework will be published in the **Federal Register** and will include information regarding the basis for the modification or suspension (*i.e.*, a description of the WCPFC decision), the temporary modifications or suspension to the regulations, and the duration of the changes. Under the framework, NMFS may change (including extend, so long as the duration of the original temporary specification in addition to any extension is less than one year) any temporary specification by publishing a new temporary specification in the **Federal Register**. NMFS may revoke any temporary specification by publishing a notification in the **Federal Register**.

Temporary specifications issued under the framework (found at 50 CFR 300.228, and as affirmed in this final rule) shall be limited to the following:

(1) Modifications or suspensions of the purse seine observer coverage requirements at 50 CFR 300.223(e), including suspensions of some or all of the requirements on a fleet-wide or individual vessel basis, requiring the carrying of observers other than WCPFC observers, requirements to carry electronic monitoring

devices in lieu of observers, and requirements to collect and submit photographic or written information;

(2) Modifications or suspensions of the regulations at 50 CFR 300.216(b)(1) prohibiting at-sea transshipment for purse seine vessels, including suspensions of some or all of the prohibitions, prior notification for an at-sea transshipment, and suspension of the prohibitions for particular transshipments; and

(3) Modifications or suspensions of the regulations at 50 CFR 300.215(d) and 50 CFR 300.216(b)(2) regarding at-sea transshipment observer requirements, including suspensions of some or all of the requirements, suspension of some or all of the requirements for particular transshipments, requiring the carrying of observers other than WCPFC observers, requirements to carry electronic monitoring devices in lieu of observers, and requirements to collect and submit photographic or written information.

Comments and Responses

NMFS received one comment letter on the interim final rule from the American Tunaboat Association (ATA), which represents U.S. purse seine vessels operating in the Pacific Ocean. ATA's letter contained several discrete comments. The comments are summarized below, followed by responses from NMFS.

Comment 1: ATA supports the interim final rule and appreciates that the rule responds in large part to ATA's comments submitted in response to a separate NMFS rulemaking that addressed observer coverage requirements during the COVID-19 pandemic.¹ ATA understands that the rule will apply only to suspension of WCPFC purse seine observer coverage requirements, suspension of the prohibition against purse seine transshipment at sea, and suspension of the at-sea transshipment observer coverage requirements. ATA supports NMFS's ability to quickly implement short-notice WCPFC

¹ See 86 FR 16307, published March 29, 2021.

decisions on these matters to ensure minimal disruption to the operations of the U.S. purse seine fleet.

Response: NMFS acknowledges the comment and agrees with ATA's understanding of the rule.

Comment 2: ATA requests NMFS to ensure that its adoption and implementation of the interim final rule and temporary specifications comply with the Administrative Procedure Act's (APA) requirements to provide the public with notice and an opportunity to comment before adopting a rule, and to provide a 30-day delay in the effective date of any substantive rule. These requirements ensure that interested and affected persons have an opportunity to alert NMFS to potential legal and practical problems arising from a rule before it is finalized, and allow interested and affected persons to adjust behavior before the rule goes into effect. According to ATA, NMFS's framework for adopting temporary specifications does not include an opportunity to comment, does not include any delay in the effective date of the regulatory change, and does not give any indication that NMFS would rely on the good cause exceptions in Section 553 of the APA to waive those provisions. According to ATA, providing some delay in the effective date and some opportunity to comment on the adoption, change, or revocation of temporary specifications issued under the framework is essential for ensuring that ATA members receive adequate opportunity to participate in the process and for ensuring that NMFS implements short-notice Commission decisions in the most effective manner possible. ATA also stated that providing some delay in the effective date and some opportunity to comment on the adoption, change, or revocation of temporary specifications issued under the framework could strengthen the legal viability of NMFS's approach.

ATA states that NMFS should ensure that members of the regulated community receive a fair opportunity to adjust their behavior to comply with the adoption, change or revocation of temporary specifications. According to ATA, making a framework action

immediately effective could render compliance impossible or could be extremely costly for ATA members. ATA gives the following example. If NMFS were to immediately revoke the observer waiver specifications during the middle of an ATA member's fishing trip, that member would face the threat of an enforcement action for any fishing done without an observer that occurred before the members learned of the revocation. If the ATA member had real-time notice of the revocation, that member would be forced to immediately stop fishing and return to a port where an observer could be made available, which could cause economic harm. ATA suggests that NMFS alter the interim final rule so that it provides an adequate effective-date delay for those actions that would impose new or restore preexisting obligations. Alternatively, ATA suggests addressing the problematic situation in each temporary specification. For example, for the situation described above regarding revocation of the purse seine observer waiver, ATA suggested that NMFS could clarify in the relevant *Federal Register* publication that the revocation would become effective after an appropriate number of days or on a vessel-by-vessel basis, as each vessel commences its first post-revocation fishing trip.

ATA states that NMFS should also provide an opportunity for public comment on temporary specifications before they become final. According to ATA, without some opportunity to comment on temporary specifications before they are finalized and go into effect, ATA members may be subject to significant sunk costs without any process. For example, the framework contemplates the potential adoption of a temporary specification requiring the use of electronic monitoring devices in lieu of observers. According to ATA, the costs to obtain and install such devices would be significant and permanent. If video cameras were used, ATA members would want to comment on how footage could be used and on enforcement implications of those uses of footage.

Response: NMFS appreciates ATA's concerns and the suggestions provided. The framework process, established at 50 CFR 300.228, allows NMFS to implement short-

notice WCPFC decisions in an efficient manner, but we note that the framework process applies only when time is of the essence. Under the framework, NMFS may implement short-notice WCPFC decisions through publication of a notification of a temporary specification in the *Federal Register* instead of through changes or additions to codified regulations. NMFS may also revoke or modify such temporary specifications through notification in the *Federal Register*, rather than through changes or additions to codified regulations. However, the new framework process does not create a blanket exemption to the APA's section 553 requirements for prior notice and opportunity for public comment and for the 30-day delay in the effective date of a new rule (5 USC 553). If NMFS decides to use the framework process to publish a temporary specification without providing prior notice or opportunity for public comment or the 30-day delay in effective date, NMFS would comply with the APA section 553 requirements and would only waive those requirements when there is justification to do so, and would explain the reasoning for the waiver(s) in the temporary specification. Section 553(b)(B) identifies those circumstances in which the agency may waive requirements for prior notice and comment: when the agency finds, for good cause, that compliance is impracticable, unnecessary, or contrary to the public interest. Section 553(d) identifies those circumstances in which the agency may waive the requirement for the 30-day delay in the date of effectiveness, including when a substantive rule grants or recognizes an exemption or relieves a restriction, when the agency finds good cause, which is published with the rule. Examples of circumstances that NMFS believes may support such waivers include emergencies, situations where delay may frustrate the accomplishment of a statutory purpose, pandemics (such as the COVID-19 pandemic), or where the public has already been afforded a prior opportunity for public comment. NMFS evaluates the need for waiver of prior notice and opportunity for public comment and the need for waiver of the 30-day delay in the date of effectiveness for each temporary specification issued

under the framework on a case-by-case basis. NMFS believes that Section 553 of the APA provides adequate safeguards to ensure that the concerns raised by ATA are addressed.

Comment 3: ATA states that NMFS should clarify the limited scope of the interim final rule. According to ATA, the preamble for the interim final rule contains potentially conflicting statements regarding its scope. Based on the preamble and regulatory language, ATA understands that, through the framework process, NMFS can only modify or suspend provisions concerning requirements contained in 50 CFR 300.223(e), 50 CFR 300.215(d), 50 CFR 300.216(b)(1), and 50 CFR 300.216(b)(2), and that any modification or suspensions would be limited to implementing short-notice Commission decisions, where those decisions address relevant global or regional health, safety, and security concerns, as well as other international emergencies and crises. However, according to ATA, elsewhere in the preamble, NMFS states that the interim final rule establishes a framework through which NMFS may issue temporary specifications that suspend or modify all existing regulations in 50 CFR part 300, subpart O. ATA requests that NMFS confirm that the interim final rule is limited to implementing Commission decisions related to the specific provisions in 50 CFR part 300 subpart O identified in the regulatory text rather than all of 50 CFR part 300 subpart O. In addition, ATA requests NMFS to clarify if NMFS foresees expanding upon the specific regulations it can suspend or modify using the framework.

Response: As stated in the preamble to the interim final rule, the framework has been established to provide NMFS with a process for efficiently modifying or suspending NMFS regulations in response to short-notice WCPFC decisions, including intersessional decisions that address relevant global or regional health, safety, and security concerns, as well as other international emergencies and crises. This framework helps ensure that NMFS regulations remain consistent with our international obligations, even when those

obligations may unexpectedly and quickly change in response to global events of an emergency nature. The purpose of this framework is not to implement the great majority of WCPFC decisions, which NMFS would implement in rules, taking into account that those decisions are to enter into effect at least 60 days after the decision is made, as specified in Article 20(5) of the Convention.

As stated above (see the “The Action” heading above), and as detailed at 50 CFR 300.228 (as affirmed in this final rule), temporary specifications issued under the framework in this final rule) are limited to the following types of actions:

(1) Modifications or suspensions of the purse seine observer coverage requirements at 50 CFR 300.223(e), including suspensions of some or all of the requirements on a fleet-wide or individual vessel basis, requiring the carrying of observers other than WCPFC observers, requirements to carry electronic monitoring devices in lieu of observers, and requirements to collect and submit photographic or written information;

(2) Modifications or suspensions of the regulations at 50 CFR 300.216(b)(1) prohibiting at-sea transshipment for purse seine vessels, including suspensions of some or all of the prohibitions, prior notification for an at-sea transshipment, and suspension of the prohibitions for particular transshipments; and

(3) Modifications or suspensions of the regulations at 50 CFR 300.215(d) and 50 CFR 300.216(b)(2) regarding at-sea transshipment observer requirements, including suspensions of some or all of the requirements, suspension of some or all of the requirements for particular transshipments, requiring the carrying of observers other than WCPFC observers, requirements to carry electronic monitoring devices in lieu of observers, and requirements to collect and submit photographic or written information.

The circumstances in which the framework will be used are narrow. Any changes to the regulations at 50 CFR 300.228 would require rulemaking action that would be subject to the APA requirements.

Comment 4: ATA requests that NMFS confirm that two sources of authority presently provide for the waiver of observer requirements for the purse seine fishery. ATA believes that NMFS's present action properly links the duration of the three temporary specifications to Commission decisions, which have reflected and will reflect the realities facing the U.S. purse seine fishery for observer coverage issues. ATA greatly appreciates NMFS's effort here. That said, ATA requests that NMFS provide some additional clarification. ATA states that the interim final rule is silent on the forward-looking relationship between the purse seine fishery and NMFS's observer-waiver rule (85 FR 17285; March 27, 2020) and the extension of that rule (86 FR 16307; March 29, 2021). ATA understands that NMFS now has two independent sources of authority by which to waive observer requirements for the U.S. purse seine fishery – the observer-waiver rule (applicable to multiple fisheries) issued under the emergency authority of 16 U.S.C. § 1855(c), and the interim final rule (applicable to the U.S. purse seine fishery) issued pursuant to the WCPFC Implementation Act. Based on this, ATA also understands that its members may presently have two current sources of authorization for the waiver of observer requirements. It would be helpful if NMFS would confirm whether ATA's understanding on these two points is accurate.

Response: As noted by the commenter, NMFS uses the framework process at 50 CFR 300.228 to implement short-notice WCPFC decisions regarding the waiver of U.S. purse seine observer coverage requirements in response to the COVID-19 pandemic. The NMFS observer-waiver rule referenced by the commenter was effective only until March 26, 2022 (see 86 FR 16307).

No changes from the interim final rule have been made in this final rule.

Classification

The Administrator, Pacific Islands Region, NMFS, has determined that this final rule is consistent with the WCPFC Implementation Act and other applicable laws.

Executive Order 12866

This final rule has been determined to be not significant for purposes of Executive Order 12866.

Regulatory Flexibility Act

As stated in the interim final rule, because prior notice and opportunity for public comment were not required for the interim final rule by 5 U.S.C. 553, or any other law, the analytical requirements of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, are inapplicable. Therefore, no regulatory flexibility analysis was required and none has been prepared. Prior notice and opportunity for public comment were not required because there was good cause under 5 U.S.C. 553(b)(B) to waive prior notice and the opportunity for public comment on the interim final rule and temporary measures. Prior notice and the opportunity for public comment would have been contrary to the public interest. When the interim final rule was issued, three short-notice WCPFC decisions needing immediate implementation had already gone into effect and NMFS was implementing those three decisions through the framework process established under the interim final rule. In addition, NMFS believed it was likely that the WCPFC would agree upon additional short-notice decisions, which address relevant global or regional health, safety, and security concerns, as well as other international emergencies and crises, in the near future. The process established under the interim final rule provided NMFS with the ability to carry out the obligations of the United States under the Convention, including promptly implementing the short-notice decisions of the Commission. NMFS stated that it would consider and respond to public comments received on the interim final rule, which it has done here.

For the reasons articulated above, NMFS also found good cause under 5 U.S.C. 553(d)(3) to waive the 30-day delay in effective dates for the interim final rule and the temporary measures.

Paperwork Reduction Act

This final rule contains no information collection requirements under the Paperwork Reduction Act of 1995.

Accordingly, this final rule affirms (without change) the regulatory text of the interim final rule that amended 50 CFR part 300 and that was published at 86 FR 31178 on June 11, 2021.

Authority: 16 U.S.C. 6901 *et seq.*

Dated: June 1, 2022.

Samuel D. Rauch, III
Deputy Assistant Administrator for Regulatory Programs,
National Marine Fisheries Service.

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